IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

THE ESTATE OF AMOS MATTHEW FRERICHS, Plaintiff, v. KNOX COUNTY, TENNESSEE, et al., Defendants, STATE OF TENNESSEE, Intervenor.	))))))))))))))	No. 3:16-cv-693

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF TENNESSEE'S MOTION TO DISMISS

This Court lacks subject matter jurisdiction over Count One of Plaintiff's Complaint, which challenges the constitutionality of Tenn. Code Ann. § 29-20-11, on the basis of mootness, ripeness, and standing. Plaintiff's arguments to the contrary are unavailing.

Plaintiff argues that the claims contained in Count One are not moot because Knox County and Officer Rogers have not unequivocally stated they will not seek attorneys' fees under Tenn. Code Ann. § 29-20-113. In Officer Rogers' motion to dismiss, his counsel, the Knox County Deputy Law Director represents:

> [Frerichs'] Estate has no assets to pay Defendant Rogers' attorneys' fees, even if awarded in this case. . . . Under these circumstances, Defendant Rogers and Knox County have no intention of seeking any award of attorneys' fees pursuant to Tenn. Code Ann. § 29-20-113 (2016). To be clear, for the reasons stated Defendant Rogers and Knox County will not seek an award of attorneys' fees pursuant to Tenn. Code Ann. § 29-20-113 (2016). Plaintiff will not suffer any injury from application or enforcement of Tenn. Code Ann. § 29-20-113.

(Doc. No. 12 at 3.) Plaintiff argues that the phrase "under these circumstances," leaves open the possibility that there may be some set of circumstances in which Defendants would seek fees under the statute. (Doc. No. 24 at 4-5.) Plaintiff's interpretation of this sentence unreasonably speculates that a circumstance could possible arise in which Defendants could go back on their word. Defendants have clearly stated they do not intend to seek fees from Frerichs' estate under the statute, rendering the claims in Count One of the Complaint moot.

Next, Plaintiff's argues that Defendants cannot decline to seek attorneys' fees because the statute affirmatively requires the Court to award fees:

> Knox County and Evan Rogers have no authority to waive what the Tennessee legislature mandated this Court to do. *See* T.C.A. § 29-20-113. There is no discretion in that statute for this Court to interpret or accept a waiver for attorney fees. The statute requires paying attorney fees by using the mandatory language of *shall*.

(Doc. No. 24 (quoting Doc. No. 21 at 7)) (emphasis in original). Plaintiff's reading of the statute is incorrect. The statute provides that, if an employee sued in his individual capacity "prevails in the proceeding as provided in this section, then the court or other judicial body *on motion* shall award reasonable attorneys' fees and costs incurred by the employee in defending the claim filed against the employee." Tenn. Code Ann. § 29-20-113(a) (emphasis added). The statute does not require the Court to award fees without a motion so requesting. As Defendants' counsel has represented that he will not seek fees from Frerichs' estate, the Court will have no occasion to award fees under the statute.

On the issue of standing, Plaintiff asserts that she and Frerichs' father, Elton Frerichs, Jr., (Mr. Frerichs) want to join the case in their capacity as Frerichs' parents and next of kin, as opposed Beverly Dunn's bringing the case as a representative of his estate, but have not done so for fear they will face attorneys' fees under Tenn. Code Ann. § 29-20-113. (Doc. No. 24 at 4-5.) According to Plaintiff, unless Defendants assure her and Mr. Frerichs that, if the Complaint is amended to add them as plaintiffs acting in the capacity of Frerichs' next of kin, Defendants will not seek attorneys' fees if Defendants ultimately prevail in the lawsuit, there continues to be "a live controversy" such that the State's motion to dismiss should be denied. (*Id.* at 6.)

There is no support in the law for Plaintiff's position. As the State's initial memorandum in support of its motion to dismiss makes clear, the Plaintiff in this matter does not have standing to raise the claims in Count One, those claims are not ripe for review, and the claims are moot. Plaintiff's assertion in response that she and Mr. Frerichs acting in the capacity of Frerichs' next of kin—who, to be clear, are *not parties* to this litigation—are able to overcome the hurdles of mootness, ripeness, and standing that the *actual* Plaintiff cannot overcome is as wildly untethered to controlling case law as her idea that asserting "conditional" claims avoids those problems. She quotes the following from the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.

133 S. Ct. 1138, 1147 (2013) (internal alterations, quotation marks, citations omitted) (emphasis in original). Beverly Dunn's claims, brought in her capacity as the personal representative of Frerichs' estate, do not meet this standard. She alleges "speculative" "possible future injury," not injury that is "actual or imminent" or "certainly impending." The case law does not apply to the injury Plaintiff alleges she and Frerichs' father will face if they decide to enter the case as Frerichs' next of kin because *they are not parties in this case*.

Given the legal citations offered by Plaintiff, quoted above, the State interprets her argument about her and Mr. Frerichs' desire to enter the case as next of kin as related to the issue of standing. If, instead, Plaintiff's argument relates to the issue of mootness, it fails on that ground as well. As with Plaintiff's standing argument, it is nonsensical to apply the case law on mootness to Ms. Dunn and Mr. Frerichs' alleged injuries as Frerichs' next of kin because they are not even parties to this litigation. For example, as the State's opening brief stated, a case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 669 (2016), *as revised* (Feb. 9, 2016) (citation omitted). Obviously, the Court cannot grant them relief, effectual or otherwise, as *they are not parties*.

Furthermore, for the reasons stated in Defendants' supplemental motion to dismiss (Doc. No. 23), in which the State joins, Ms. Dunn has no standing to bring a wrongful death action as representative of Frerichs' estate under Tennessee law. *Johnson v. Metro. Gov't of Nashville & Davidson Cty*., 665 S.W.2d 717, 718 (Tenn. 1984) ("While an action for wrongful death, of course, may be instituted and maintained by an administrator, T.C.A. § 20–5–107, it has long been settled that the administrator sues as a representative of the next of kin, and not as a representative of the estate or of creditors.").

In conclusion, a plaintiff responding to a Rule 12(b)(1) motion may present evidence in response to the attack on the factual basis for jurisdiction, but whether or not the plaintiff presents evidence, he or she bears the burden of proving that jurisdiction exists. *DLX, Inc. v. Kentucky,* 381 F.3d 511, 516 (6th Cir. 2004). Here, Plaintiff has failed to meet her burden of proof. For these reasons and those stated in the State's initial memorandum of law in support of its motion to dismiss (Doc. No. 18) and Defendants' memoranda of law in support of their motions to dismiss

(Doc. Nos. 12, 13, 23), the State respectfully asks the Court to dismiss Count One of Plaintiff's Complaint because the claims contained therein are moot and not ripe and because Plaintiff lacks standing to bring them.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

/s/ *Leslie Ann Bridges*
Senior Deputy of Public Protection Section
and Counsel to the Attorney General
Office of the Attorney General
Post Office Box 20207
Nashville, Tennessee 37202
(615) 741-4710
leslie.bridges@ag.tn.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 17th day of April, 2017, a copy of the above document has been served upon the following persons by Electronic Case Filing (ECF) system:

Houston S. Havasy
Law Offices of Herbert S. Moncier
550 W. Main St., Suite 775
Knoxville, TN 37902
Attorney for Plaintiff

David S. Wigler
Knox County Law Director's Office
400 Main Street, Suite 612
Knoxville, TN 37902
Attorney for Knox County, Tennessee, Knox County Sheriff J.J. Jones, and Knox County Deputy Evan Rogers

/s/ *Leslie Ann Bridges*
Senior Deputy of Public Protection Section
and Counsel to the Attorney General